IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929

SA.No. 335 of 1992(F)

(AGAINST THE DECREE AND JUDGMENT DATED 20/11/1991 IN AS.NO.59/1989 ON THE FILE OF THE DISTRICT COURT,THRISSUR, WHICH WAS AN APPEAL FROM THE DECREE AND JUDGMENT DATED 22/06/1988 IN OS.33/1982 ON THE FILE OF THE SUB COURT, THRISSUR)

.....

APPELLANTS: (RESPONDENTS 1 & 2/PLAINTIFFS):

----

1. SMT. PADMAVATHY,
W/O. ANDEZHATH RAJEEVASAMBHAVAN,
RESIDING AT THAIKKATTUSSERY DESOM,
EDAKUNNY VILLAGE, THRISSUR TALUK.

2. SMT. LEELA,
W/O.KURUVATH VIJAYAN,
RESIDING AT XXXIII/1568,
COCHIN CORPORATION, CHERICHIPARAMBIL,
P.O.VENNALA, KOCHI – 682 025.

BY ADV. SRI.T.K.VENUGOPALAN
SRI.DINESH R.SHENOY

RESPONDENTS: (APPELLANTS & RESPONDENTS 3 & 4/DEFENDANTS 1,2 AND 4)

----

1. * T.K. BALAKRISHNAN,
S/O.THAZHATH KRISHNAN,
CHEMBUKKAVU DESOM, THRISSUR VILLAGE,
THRISSUR TALUK. (D I E D) – LR'S IMPLEADED:

..2/-

S.A.NO.335/1992

2. ** T.K. KUNHUNNI,
S/O.THAZHATH KRISHNAN,
T.C. VII/311/1, KOOTHUROAD,
ELIPPOD, THIRUVANANTHAPURAM. (D I E D)-LR'S IMPLEADED:

3. P.S.SANKU,
S/O.PERUMPARAMBIL SANKARAN
CHEVOOR VILLAGE, THRISSUR TALUK.

*ADDL.R4 TO R7 ARE IMPLEADED:

R4. C.V.SARADHA,
AGED 72, W/O.T.K.BALAKRISHNAN,
THAZHATH HOUSE, MAYOOR APPTS,
D BLOCK, FLAT NO.308 (K.H.H.P.)
CHUNKOM P.O., AYYANTHOLE, THRISSUR DISTRICT.

R5. T.RANJITH KUMAR,
AGED ABOUT 50 YEARS,
S/O.T.K.BALAKRISHNAN,
THAZHATH HOUSE, YUVAKALA THARANG ROAD,
KOCHI – 682 026.

R6. KISHORE KUMAR,
AGED ABOUT 45 YEARS,
THAZHATH HOUSE, NEAR VICTORY I.T.C.,
M.O.ROAD, THRISSUR.

R7. DR.T.DINESH KUMAR,
AGED ABOUT 43 YEARS,
S/O.T.K.BALAKRISHNAN,
THAZHATH HOUSE, DOCTORS RESEARCH LABORATORY,
PALACE ROAD, THRISSUR.

*ADDL.R4 TO R7 ARE IMPLEADED AS LR's OF DECEASED R1 VIDE ORDER DTD. 7/07/03 ON C.M.P.NO.2332/01.

..3/-

S.A.NO.335/1992

**ADDL.R8 TO R10 ARE IMPLEADED:

R8. K.K.AMMU, W/O.T.K. KUNJUNNI, AGED 69,
T.C.34/725, THAZHATH HOUSE,
KARIMANKULAM, KOOTHU ROAD,
VATTIYOORKKAVU P.O., THIRUVANANTHAPURAM.

R9. T.K.KRISHNAKUMAR, AGED 44,
S/O.T.K.KUNJUNNI, AT.C.34/725,
THAZHATH HOUSE, KARIMANKULAM,
KOOTHU ROAD, VATTIYOORKKAVU P.O.,
THIRUVANANTHAPURAM.

R10. T.K.ANILKUMAR,
S/O.T.K.KUNJUNNI, AGED 39,
T.C.34/725,THAZHATH HOUSE,
KARIMANKULAM, KOOTHU ROAD,
VATTIYOORKKAVU P.O., THIRUVANANTHAPURAM.

(**ADDL.R8 TO R10 ARE IMPLEADED AS LR's OF DECEASED R2
VIDE ORDER DTD. 7/07/2003 IN C.M.P.NO.92/02)

***ADDL.R11 TO R13 ARE IMPLEADED:

R11. RAMACHANDRAN,
SON OF KADAMBUZHA VASU,
P.O.PERINCHERY, (VIA) OLLUR, THRISSUR – 680 306.

R12. PAVIZHAM, WIFE OF RAMACHANDRAN, ...DO..DO...

R13. RAPPAI, SON OF THEKKINETH LONA, VALLACHIRA
VILLAGE, P.O.PERINCHERY, VIA OLLUR,
THRISSUR – 680 306.

(***ADDL.R11 TO R13 ARE IMPLEADED AS PER ORDER DTD.
20/09/06 IN I.A.2041/2004)

BY ADV. SRI.A.P.CHANDRASEKHARAN)
SRI.G.SHRIKUMAR)
SMT.PRABHA R.MENON)
SRI.KODOTH PUSHPARAJAN)
SRI.M.KRISHNAKUMAR) for Addl.R4 to R7
SRI.K.JAYESH MOHANKUMAR)
SRI.K.PADMANABHAN for Addl.R13

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 26/07/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.335 OF 1992

Dated 26th July 2007

J U D G M E N T

Plaintiffs in O.S.33 of 1982 on the file of Sub court, Thrissur are appellants. Respondents 1 to 3 are defendants. Respondents 4 to 7 were impleaded as legal heirs of deceased first respondent. On the death of second respondent respondents 8 to 10 were impleaded as his legal heirs. Respondents 11 to 13 were subsequently impleaded as the assignees of first respondent. Appellants instituted the suit seeking a decree for partition and allotment of their shares contending that plaint schedule property originally belonged to their father Krishnan and on the death of Krishnan it devolved on 3rd defendant widow and appellants and defendants 1 and 2, the children and all of them are in joint possession and enjoyment of the property and therefore they are entitled to get their share separated. It was contended that father Krishan was a drawing master and was drawing more than Rs.80 per month and plaint schedule properties

were purchased by him utilising his own funds and it was later learned that first defendant by coercion and practising fraud and undue influence got Ext.B3 sale deed executed in his favour by the father and that sale deed was procured by first respondent with the help of Kokken Ouseph and it is not valid and binding on appellants and no consideration was paid and therefore it is void and appellants are entitled to their shares. First respondent in the written statement contended that plaintiff and second defendant have no right over the property and though properties stood in the name of the father, properties were purchased utilising the funds supplied by first respondent and father Krishnan admitting the source of the fund assigned the properties in his favour under Ext.B3 and Ext.B3 is not vitiated by undue influence or coercion and it is valid and binding on plaint schedule property and deceased Krishnan did not challenge the document during his life time and appellants are not entitled to claim any share. 2nd defendant in his written statement supported plaintiff's case and sought his share separated. 3rd defendant also filed a written statement supporting the case of appellants. 4th defendant contended that he is unnecessary party and out of the property purchased by

first respondent, he purchased 33-1/6 cents for valuable consideration and that property cannot be partitioned and in case of partition it is to be allotted to the share of first respondent.

2. Learned Munsiff framed necessary issues. On the evidence of PWs.1 to 4, DW1, Exts.A1 to A13, B1 to B21 and X1 to X3 learned Munsiff held that Ext.B3 was not supported by consideration and property was not purchased by first respondent in the name of father and therefore consideration shown in Ext.B3 is not correct. Holding that as there is no consideration Ext.B3 is void as provided under Section 25 of Contract Act it was found that plaint schedule properties devolved on all the legal heirs. A preliminary decree for partition was passed directing division and allotment of shares of plaintiffs and second defendant. First respondent challenged the decree and judgment before District court, Thrissur in A.S.59 of 1989. Learned District Judge on re-appreciation of evidence found that Ext.B3 cannot be a void document and if at all could only be a voidable document and unless that document is set aside appellants are not entitled to claim any share. On the evidence it was found that appellant did not establish that Ext.B3 was vitiated, either by undue influence or coercion and as

past consideration is valid consideration held that Ext.B3 is supported by consideration and therefore it is not void. Learned District Judge also found that even though Ext.B3 sale deed was executed on 3/6/1967 Krishnan died only in October 1979 and till his death Krishnan did not challenge Ext.B3 and in such circumstances, appellants are not entitled to claim any share. Appeal was allowed and preliminary decree passed by the trial court was set aside and suit was dismissed. It is challenged in the appeal.

3. Appeals were admitted formulating the following substantial questions of law.

> 1) Whether first appellate court was justified in interfering with the findings of the trial court that Ext.B3 is void under Section 25 of Contract Act.
>
> 2) Whether Ext.B3 sale deed was vitiated by coercion, undue influence and fraud whether appellants are not entitled to claim a share in the property.
>
> 3) Whether first appellate court was justified in setting aside preliminary decree passed by trial court.

4. Learned counsel appearing for appellants and

the contesting respondents were heard.

5. Learned counsel appearing for appellants vehemently argued that trial court after elaborate consideration found that Ext.B3 sale deed was executed without consideration and as provided under Section 25 of Indian Contract Act, Ext.B3 is void for want of consideration and if so appellants are entitled to ignore Ext.B3 and first appellate court was not justified in interfering with the appreciation of evidence by the trial court. Learned counsel also argued that the consideration shown in Ext.B3 is the consideration originally paid for purchase of the properties covered thereunder and from the evidence it is absolutely clear that the consideration for purchase of the properties were met by Krishnan himself and not by first respondent and that factual finding entered by the trial court should not have been interfered by the first appellate court and therefore the preliminary decree passed by the trial court is to be sustained and that of the first appellate court is to be set aside. Learned counsel further argued that evidence establish that Ext.B3 sale deed was the result of undue influence and coercion on the part of first respondent, the beneficiary of the document and therefore appellants are entitled to ignore

Ext.B3 and claim partition and first appellate court was not at all justified in setting aside the preliminary decree. Learned counsel appearing for respondents submitted that first appellate court has appreciated the evidence in the proper perspective and decided the question correctly and there is no reason to interfere with that findings and appeal is only to be dismissed.

6. Ext.B3 registered sale deed was executed on 3/8/1967. Item No.1 and 2 of the plaint schedule properties were acquired under Ext.A1 and item No.3 under Ext.A2 sale deed and item No.4 under Ext.A3 sale deed. Exts.A1 to A3 show that plaint schedule properties were purchased by Krishnan. Case of appellants is that properties were purchased by Krishnan with his own funds and not with the funds of first respondent. It was argued that when Ext.B3 shows that consideration for the purchase of the properties sold thereunder was the consideration originally paid by Krishnan for the purchase of the same properties and evidence prove the contrary it can only be held that Ext.B3 was executed for no consideration and if so, finding of the trial court is absolutely correct and the findings of first appellate court is to be set aside.

7. What was contended in the plaint itself was

that Ext.B3 sale deed was procured by first respondent by exercising fraud, undue influence and coercion on his father as at a time when first respondent and the parents were residing together and other children were living away from them. Case pleaded and sought to be proved was that on the next day of execution of Ext.B3 sale deed appellant and other children were informed by PW2 that on the previous day their father Krishnan was forcibly taken away by first respondent under threat and PW2 had heard the threat made by first respondent that if properties are not sold in favour of first respondent, Krishnan will be killed and along with the attester first respondent took Krishnan in car to the Sub Registrar's office. It is the case that on getting information other children including appellant reached the house where father was admittedly residing at that time with first respondent and Krishnan disclosed to them that he was threatened and under coercion he had executed Ext.B3 sale deed. Therefore, even according to appellants and the second defendant they were aware of execution of Ext.B3 sale deed on 4/6/1967 itself. Krishnan died only on 30/10/1979. Till the death of Krishnan nobody challenged Ext.B3 sale deed, including Krishnan. On the other hand, evidence was adduced to the effect that there

was negotiations and mediations to divide the property and first respondent was prepared to execute sale deed in favour of second respondent brother and appellants sisters portions of the properties recognising their right. But question is whether in the nature of case it could be said that Ext.B3 was initiated by undue influence, coercion or fraud. Learned Sub Judge on appreciation of evidence found that appellants did not succeed in establishing any of the vitiating factors either undue influence, or coercion or fraud. First appellate court on reappreciation confirmed that findings. Hence that finding of facts is final. Hence Ext.B3 cannot be a voidable document. Question is whether it is a void document.

8. The trial court finding that Ext.B3 was not supported by consideration held that document executed without consideration and so it is void as provided under Section 25 of Contract Act and therefore held that the properties were available for partition as they belonged to Krishnan. Consideration shown in Ext.B3 is the consideration which was originally paid for acquisition of the same properties under Exts.A1 to A3. True, Exts.A1 to A3 show that consideration for the purchase of plaint schedule properties was paid by Krishnan. It is also true

that plea of binami transaction would not have been available to the parties, in view of Binami Transaction (Prohibition) Act. But it does not mean that a father is not entitled to purchase property utilising the funds given to him by a son and later admitting that fact assigning the property to the same son. Even if father has sufficient capacity and funds, a father can purchase property using the funds given to him by one of the sons. If that be so, fact that Krishnan was a drawing teacher is not very relevant to decide whether consideration for purchase of Exts.A1 to A3 was paid by Krishnan out of his funds or with the funds given by the son.

9. The question is who is the most competent person to disclose the source of the funds utilised for paying the consideration paid for the purchase of the properties under Exts.A1 to A3. Properties were purchased by Krishnan as reflected in Exts.A1 to A3. It is that Krishnan who executed Ext.B3 declaring that consideration for purchase of the properties was paid by him from the funds given to him by first respondent. Ext.B3 was executed in 1967. till the date of death of Krishnan in 1979, the facts stated by Krishnan in Ext.B3 was not disputed. Therefore, statement of Krishnan in Ext.B3 establish that consideration paid for purchase of

the properties were given to him by first respondent. It is that consideration which was taken as the consideration for transferring the properties in favour of first respondent. Therefore it cannot be said that Ext.B3 is not supported by consideration. If that be so, it cannot be a void document as found by trial court. First appellate court rightly appreciated the evidence and found that Ext.B3 is not a void document and even if case of appellant is true, it could only be a voidable document.

10. If Ext.B3 is not void, its legal effect is that unless Ext.B3 is set aside, appellants or second respondent are not entitled to claim share in the plaint schedule properties because under Ext.B3 the properties were alienated by Krishnan in favour of first respondent and properties were not available with Krishnan at the time of his death. Learned counsel appearing for appellants argued that Ext.B3 was not acted upon and it is sham and nominal document. But there is no plea in the plaint that Ext.B3 is a sham and nominal document which was never acted upon. If there was a plea that Ext.B3 was a sham and nominal document and not acted upon or was not intended to be acted upon, appellants could have contended even without setting aside that document they

are entitled to claim a share. But in the absence of a case that Ext.B3 was a sham and nominal document, even if it is a voidable appellants are not entitled to claim a share in the properties without setting aside the document as rightly found by first appellate court.

11. Even with regard to the case of coercion and undue influence, as rightly appreciated by courts below, there is no evidence to prove fraud, undue influence or coercion. Father Krishnan who was alive for more than 12 years after execution of Ext.B3 and still he did not challenge it. In such circumstances on the facts, I do not find any reason to interfere with findings of first appellate court.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

==========

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.335 OF 1992

26th JULY 2007

==========